

CyberBytes™

Straight Talk about Electronic Evidence Discovery in Civil Cases- August 2006

Intentional E-Discovery

This summer's lecture tour for CyberControls has been extremely hectic and has covered dozens of visits with all sized law firms and associations across the country. Before our representative starts with their presentation, they always ask to see just how many attendees have had to deal with electronic discovery and/or computer forensics in their commercial litigation practice? With few exceptions, the response has reflected that less than ten percent of the attendees have utilized the pursuit of electronic evidence to any real extent.

For those of us who are focused solely on the issues of requesting or producing e-evidence in behalf of our attorney clientele, an audience of commercial trial attorneys in the ninety-percentile who admit to not utilizing e-discovery on a regular basis in their commercial cases is a telling reality. But, follow-up surveys and discussions with attendees provide the following insight into some of the factors that influence the reluctance of many trial attorneys to embrace e-discovery more aggressively:

71% of attendees are fearful of a retaliatory e-discovery attack upon their clients by their opponents

The fear of a retaliatory e-discovery attack should not stifle a lawyer's ability to conduct an adequate discovery effort. We advise that lawyers should proactively meet with their clients to discuss the potential of a mirror-image e-discovery served upon them and the need to prepare themselves for it. Eliminating the element of surprise from the client's perspective will significantly diminish one's hesitancy in going forward.

84% are convinced that their client will not agree to pay for an e-discovery request coupled with a computer examination of their opponent's computer systems

Many trial attorneys assume that e-discovery and computer forensics is costly and not worth discussing it with most commercial clients. This kind of thinking is a mistake and a disservice to the client. By having a half hour discussion with CyberControls at no cost about the matter in

general, a Scope of Work estimate can be generated for you to consider with your client.

77% admit that they do not routinely discuss the possibility of incorporating e-discovery or digital forensics with their clients before nixing the idea

Commercial clients rely upon his/her attorneys' knowledge and experience. To omit a dialog with the client about the role of e-discovery and digital forensics in the discovery stage of litigation might result in a catastrophic outcome for the client and the potential for a malpractice claim being filed.

64% admit to a lack of confidence when it comes to dealing with the technical aspects of electronic evidence discovery

With few exceptions, most technology experts are not attorneys or judges. Most attorneys choose to shy away from technology because it can be extremely difficult to "reason" with. There is no way to become instantly proficient in all aspects of digitally created information.

But this area of deficiency can be mitigated by enlisting the support services of CyberControls.

55% admit to not having a thorough knowledge of how to formulate an e-discovery plan

Most of the motions, pleadings, interrogatories, strategic planning and protective orders dealing with e-discovery requests or production require greater specificity about the nature and format of the electronic information being referenced to ensure accuracy with the final production. Pretrial research and identification of all potential storage media on which that information may be stored requires careful planning. A firm like CyberControls can be retained to cover many of the technical aspects required to implement an effective e-discovery plan.

Somewhere between 92%-96% of all civil litigation complaints are settled by the parties long before a judge or jury actually has to rule on the case. When it comes to demonstrating the prima facie elements in supporting a claim, conducting e-discovery with intentionality will most assuredly change the composition of the proceedings which can often result in a more favorable outcome. But, it is up to you to take the next step. For a no obligation phone discussion of a particular matter,

please call us at 847-756-4890 or visit our cyber site at

www.cybercontrols.net. You are also invited to write to us at cyberinfo@cybercontrols.net.

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This document is neither designed nor intended to provide legal or other professional advice but is intended merely to be a starting point for research and information on the subject of electronic evidence discovery. While every attempt has been made to ensure accuracy of this information, no responsibility can be accepted for errors or omissions.

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